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No. 01-1487

Supreme Court, U.S.
FILED
MAY 17 2002
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IN THE SUPREME COURT OF THE UNITED STATES

D. A. MAYLE, Warden, *Petitioner,*
v.
RICHARD N. BROWN, *Respondent.*

EDDIE YLST, Warden, *Petitioner,*
v.
ERNEST BRAY, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

SUPREME COURT REVIEW IS NEEDED IN THIS CASE, NOTWITHSTANDING THIS COURT'S GRANTING OF CERTIORARI IN *ANDRADE v. LOCKYER* AND *EWING v. CALIFORNIA*

Respondents oppose the petition for a writ of certiorari, arguing that the Ninth Circuit Court of Appeals decision was correct. More specifically, they contend that the state courts' determinations that the Eighth Amendment permits punishment of felonious petty theft by a term of 25 years to life when the defendant has a violent and extensive criminal history were "contrary to" and "unreasonable applications" of clearly established United States Supreme Court precedent. For this reason, Respondents conclude, the case is not worthy of Supreme Court review.

This Court recently granted certiorari in *Lockyer v. Andrade*, 122 S. Ct. 1434 (U.S. Apr. 1, 2002) (NO. 01-1127), and *Ewing v. California*, 122 S. Ct. 1435 (U.S. Apr. 1, 2002) (NO. 01-6978). In *Andrade*, the defendant received a 50-years-to-life sentence for his two concurrent convictions for petty theft. The Ninth Circuit ruled that the state court's decision that the sentence was constitutional was an unreasonable application of controlling federal precedent. In *Ewing*, the state appellate court upheld a 25-years-to-life sentence for a defendant convicted of grand theft. The granting of certiorari in these cases demonstrates that the Eighth Amendment issue presented here warrants Supreme Court review.

Alternatively, Respondents argue that if certiorari is granted, the case "should be held in light of this Court's grant of certiorari in *Lockyer v. Andrade* and *Ewing v. California*." (Resp't Opp'n to Pet. for Writ of Cert. at 15.) This result, they contend, is appropriate because "the Ninth Circuit's decision in this case was expressly based on *Andrade* and because the

issues presented are, to a very large extent, the same as in *Andrade* and *Ewing* . . .." (*Id.* at 18.) Petitioners disagree.

Although the decision in this case subsumes the issues presented in *Andrade* – the constitutionality of a sentence imposed under the Three Strikes law for an offense of petty theft with a prior – its expansion of *Andrade's* holding to the present facts provides additional grounds and further justification for Supreme Court review. Andrade's prior convictions were for non-violent offenses. Both Brown and Bray, however, have extensive criminal histories that include numerous crimes of violence. (Pet. for Writ of Cert. at 4-5, 14.) The nature of these prior convictions may be relevant to the ultimate resolution of the Eighth Amendment question. *Solem v. Helm*, 463 U.S. 277, 296 n.21 (1983) (prior offense relevant to Eighth Amendment question); *id.* at 292-93 ("non-violent crimes are less serious than crimes marked by violence or the threat of violence."). Also, Andrade received a "sentence of 50 years to life" for his two concurrent convictions for petty theft, considerably longer than Brown's and Bray's 25-years-to-life sentences. The "harshness of the penalty" is a relevant factor to consider in deciding the constitutionality of a sentence. *Solem*, 463 U.S. at 292.[1/]

More importantly, review is needed to address the Ninth Circuit's erroneous ruling that partial analysis of a federal constitutional claim by a state court may be viewed as the deletion of a factor in a test established by the Supreme Court. *Brown v. Mayle*, 283 F.3d 1019, 1025 (9th Cir. 2002). Under this holding, a state court's failure to *explicitly* apply all of the analysis required by Supreme Court precedent renders the state court adjudication "contrary to" controlling federal precedent,

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1. This case also differs from *Ewing*. In that case, the defendant was convicted of grand theft, the first offense of which can constitute a felony. A first offense of petty theft, on the other hand, can only constitute a misdemeanor.

thereby bypassing AEDPA deference and permitting *de novo* federal review.[2/]

The California Court of Appeal in this case, however, cited *Harmelin v. Michigan*, 501 U.S. 957 (1991) as controlling authority on the Eighth Amendment claim, and briefly discussed the facts of that case. The court concluded that in light of *Harmelin* – upholding a sentence of life imprisonment without possibility of parole against a defendant convicted of possessing 672 grams of cocaine – "a term of 25 years to life for a person with defendant's record cannot be considered disproportional." (App. G.) The Ninth Circuit held that, notwithstanding the California Court of Appeal's application of *Harmelin*, the leading Supreme Court decision on cruel and unusual punishment, its absence of an explicit discussion of some of the required Supreme Court analysis rendered the adjudication "contrary to" controlling federal precedent. *Brown,* 283 F.3d at 1025 ("the state court decisions in both cases failed to apply some or all of the required Supreme Court analysis. . . ."); *id.* at 1039 ("Because the addition, deletion, or alteration of a factor in a test established by the Supreme Court constitutes a failure to apply controlling Supreme Court law, Brown's habeas petition, like Bray's, is properly resolved under the 'contrary to' clause of AEDPA.").

The California Court of Appeal did not apply an incorrect standard. Nor did it reach a result different than a Supreme Court case involving materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). At most, it did not *explicitly* discuss every factor relevant to

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2. This issue is not presented in either *Andrade* or *Ewing*. The Ninth Circuit's decision in *Andrade* was based on application of the "unreasonable application" clause; the state court decision was not deemed "contrary to" controlling federal precedent. *Andrade*, 270 F.3d at 767 ("The California Court of Appeal's conclusion to the contrary resulted from an unreasonable application of clearly established Supreme Court law.") *Ewing* was not a federal habeas case and, thus, the "contrary to" clause of § 2254(d)(1) had no application.

deciding the Eighth Amendment question. As Petitioners previously argued, nothing in the phrase "adjudicated on the merits" *in 28 U.S.C.* § 2254(d)(1) requires state courts to completely explain their reasoning process. (Pet. for Writ of Cert. at 25.) In fact, nine other federal circuit courts of appeals have ruled that state court adjudications are entitled to deference even when they provide no reasoning at all. (*Id.* at 25-26.) "It would be odd to require a less deferential approach to reasonableness in cases where the state courts attempted to articulate reasons for their decisions than in those where they did not." *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001).

For these reasons, the petition for writ of certiorari should be granted.

CONCLUSION

For the stated reasons, the petition for a writ of certiorari should be granted.

Dated: May 16, 2002

Respectfully submitted,

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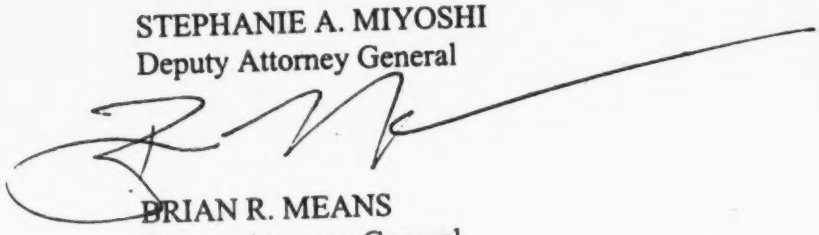

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